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No. 514

# In the Supreme Court of the United States

OCTOBER TERM, 1959

MARVIN ROTH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (R. III, 1–10;[1] Pet. App. 19–28) is reported at 270 F. 2d 655.

### JURISDICTION

The judgment of the court of appeals was entered on October 8, 1959 (R. III, 11; Pet. App. 28–29). The petition for a writ of certiorari was filed on November 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in three volumes, of which volumes one and three will be referred to by their Roman numerals. Volume two, containing the transcript of the trial testimony, will be referred to as "Tr."

## QUESTION PRESENTED

Whether the evidence was sufficient to support the finding of the trial court sitting as the jury that there had been no entrapment.

## STATUTES INVOLVED

21 U.S.C. 353(b), 65 Stat. 648, provides in part:

> (1) A drug intended for use by man which—
>
> * * * * *
>
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; * * * shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

21 U.S.C. 331, 62 Stat. 582, provides in part:

> The following acts and the causing thereof are prohibited:
>
> * * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

21 U.S.C. 333(a), 52 Stat. 1043, provides in part:

Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *

26 U.S.C. 4705(a), 68A Stat. 551, provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 7237(b), 70 Stat. 568, provides in part:

* * * Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *.

## STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Eastern District of Missouri in counts 1 and 2 (R. I, 7–8) with unlawful sales of paregoric, a narcotic drug, in violation of 26 U.S.C. 4705(a) (*supra*, p. 3). Counts 3 through 8 (R. I, 8–12) charged the unlawful dispensing of dextroamphetamine sulfate tablets and capsules ("bennies"), without prescriptions or without refills authorized by the physician, contrary to the provisions of 21 U.S.C. 353(b)(1) (*supra*, p. 2), which resulted in such drugs being misbranded while held for sale in violation of 21 U.S.C. 331(k) (*supra*, pp. 2–3). In a non-jury trial (R. 1, 22), the petitioner was found guilty on all counts, and sentenced to concurrent terms of imprisonment for eight years under counts 1 and 2, and to imprisonment for one year under each of counts 3 through 8, to run concurrently with each other and with the sentence imposed under counts 1 and 2 (R. I, 33). On appeal (R. I, 34–35) the conviction was unanimously affirmed (Pet. App. 28–29).

The evidence adduced at the trial may be summarized as follows:

On September 29, 1956 (count 3), Food and Drug Inspector Boyle, dressed in truck driver's clothes, drove a rented truck tractor into a gasoline station in St. Louis, Missouri (Tr. 20–21, 22). Boyle told the attendant that he wanted to purchase some "aspirins, to keep you awake" (Tr. 7, 8, 16). Gibson telephoned a request for "bennies" to the petitioner who mentioned that the sale would have to be large enough

to make it "worth his while" (R. 9). The petitioner drove into the station about 30 minutes later (Tr. 9, 13), and sold Boyle two bottles of dexedrine tablets for $50 (Tr. 17–18).

On October 10, 1956 (count 4), Food and Drug Inspector Gebhart obtained a prescription from a Dr. Flotte for 50 dexedrine tables in the name of a Dick McCoy (Tr. 39–41). The prescription was not refillable (Tr. 47). On October 11 the petitioner, who was working part-time as a pharmacist at the Joseph Drug Store, filled the prescription (Tr. 52–54).

On December 29, 1956, at the Joseph Drug Store, Food and Drug Inspector Cramer handed to the petitioner a piece of paper with the McCoy prescription number on it. The petitioner refilled the prescription without the doctor's authorization (Tr. 42, 43, 57–59), although he knew he was supposed to verify prescriptions before refilling (Tr. 210). The petitioner asked if the tablets were for Cramer, who replied that they were for his son-in-law, McCoy. Cramer inquired whether petitioner could sell a few dozen nietandren tablets, but petitioner answered that he "should not" sell these without a prescription (Tr. 58). The petitioner testified that Cramer also asked if the petitioner could sell paregoric for Cramer's friend in Springfield, and that the petitioner had refused (Tr. 186–188, 209). Cramer denied having made the request as to paregoric at that time (Tr. 85).

On January 8, 1957 (counts 5 and 6), Cramer went to the Joseph Drug Store where the petitioner again refilled the McCoy prescription without authorization from Dr. Flotte (Tr. 60–62). Cramer stated that his

son-in-law, McCoy, had a truck route and could use many dexedrine tablets. The petitioner mentioned that there would not be much saving in buying the tablets by hundreds, but that he was a drug salesman who could obtain a large supply without difficulty and could furnish them for $30 per thousand. Cramer went to the petitioner's car and purchased 1,000 tablets for $30 (Tr. 63–64). There was no prescription for this purchase (Tr. 65).

On January 15, 1957 (count 7), Cramer telephoned the petitioner to ask if he had dexedrine spantules, slowly disintegrating "bennies", one of which could last the whole day. The petitioner replied that he had some and Cramer ordered 100 tablets to be picked up the next day (Tr. 67–69, 71). In this telephone conversation, Cramer stated that McCoy had asked about obtaining some "PG", or paregoric, but that he (Cramer) did not want to have anything to do with it or take a chance. The petitioner said, "I know what you mean. * * * you can get two to three" years for selling it. Cramer agreed, stating that he was afraid and it was "not worth the risk" (Tr. 68–70). Cramer repeated that he did not want to have anything to do with paregoric, but that he would bring McCoy down if the petitioner wanted to take a chance. The petitioner announced that he could get paregoric for less than the $45 or $50 per gallon which Cramer said McCoy had been paying, but that paregoric was "dynamite, and that it meant the Feds" (Tr. 70).

On January 16, 1957, the petitioner met Cramer near Nash's Drug Store in accordance with the arrangement made the preceding day and sold him a

bottle of dexedrine spantules for $9.00 (Tr. 71–73). There was no prescription for this purchase (Tr. 74).

As to count 1, on January 18, 1957, inspector Cramer called the petitioner to say that McCoy would be in town three days later (Tr. 93–94). On January 21, Cramer introduced narcotics agent Witt (as Dick McCoy) to the petitioner (Tr. 94–95, 106). The petitioner turned to Witt and asked, "[W]hat do you want?" Witt answered that he wanted some paregoric. After discussing prices, the petitioner agreed to sell two gallons for $75 and to meet Witt the next day (Tr. 106–107, 98). At this meeting on January 22, Witt paid him $75 for two gallons of paregoric. After Witt had transferred the paregoric to his car, the petitioner warned, "You know, we have got to be careful about this, the Government would be interested" (Tr. 107–108). The petitioner asked Witt when he wanted an additional supply and how much he could handle. Witt stated he could take five or ten gallons either that week or the next (Tr. 109). Witt did not have a government order form and was not registered to buy paregoric, which is a narcotic containing opium (Tr. 110–111, 132).

As to count 2, on January 25, 1957, according to a previous agreement, Witt met the petitioner and purchased from him five gallons of paregoric for $175 (Tr. 111–114). Again there was no government order form and Witt was not registered to buy paregoric (Tr. 115). The petitioner in his own testimony admitted the two paregoric sales and his knowledge that paregoric as a narcotic could not be sold legally in gallon lots without a prescription (Tr. 204).

As to count 8, by previous agreement made on January 25, 1957, on February 1, Witt met the petitioner, who delivered to him 200 metandren tablets and 1,000 dexedrine spantules for which there was no prescription. The petitioner was then placed under arrest (Tr. 117–120, 112–113).

## ARGUMENT

1. The petitioner contends that there was entrapment as to counts 1 and 2 (paregoric sales), even if there was no entrapment as to counts 3 through 8 (dexedrine sales), since paregoric was first mentioned by a government agent (Pet. 9–16). As the court below noted, however, the evidence amply justified the conclusion of the trier of fact that the petitioner was not entrapped.

In the telephone conversation of January 15, 1957, when Cramer stated that the subject of paregoric was discussed for the first time, he did not open the discussion by asking to purchase paregoric. Rather he stated that McCoy had asked about obtaining some, but that he (Cramer) did not want to have anything to do with it. The petitioner agreed that paregoric was dangerous, but when Cramer offered to bring McCoy down if the petitioner wanted to take a chance, the petitioner did not make an outright refusal to sell. He stated that he could get paregoric for less than the price Cramer said McCoy had been paying (see the Statement, *supra*). This showed interest on the petitioner's part in making a sale of his own volition.

When the meeting took place he immediately asked Witt (McCoy) what he wanted, was told that Witt wanted paregoric, discussed prices, and made the sale

without persuasion and with no reluctance. The petitioner's continued readiness to sell paregoric was shown when, immediately after the first sale, he asked Witt when he wanted an additional supply and how much he could handle. At that time the petitioner arranged for the second sale which was also made voluntarily without persuasion of government agents (see the Statement, *supra*).

In order to disprove entrapment, it was sufficient for the government to show, without the necessity of proving previous narcotics offenses, that the petitioner was ready and willing, without undue persuasion, to make the paregoric sales charged in counts 1 and 2, if given the propitious opportunity. Cf. *Masciale* v. *United States*, 356 U.S. 386; *Demos* v. *United States*, 205 F. 2d 596 (C.A. 5), certiorari denied, 346 U.S. 873; *United States* v. *Perkins*, 190 F. 2d 49 (C.A. 7); *Silva* v. *United States*, 212 F. 2d 422 (C.A. 9).[2] The evidence disclosed a ready complaisance on the petitioner's part, rather than commission of offenses which were the product of the creative activity of government officials.

Moreover, as the court below pointed out, this evidence must be judged in the light of the petitioner's known and admitted predisposition to violate the law through food and drug offenses. Even though the

[2] In *Silva* (212 F. 2d at 424) the court stated: "Even though an accused had no previous criminal record and the officers were not shown to have knowledge of a predisposition on his part to commit a crime, still if the jury believed that the felonious intent and purpose were present at the time of the act they would be free to reject the accused's claim of entrapment. There is always a first time wilfully to engage in crimnal conduct."

sales of paregoric, involving narcotics, carry more serious penalties than the dexedrine pill sales, the view of the court below that these are similar offenses is reasonable. Both involve illegal sale of medicines sold subject to legal safeguards. Cf. *Carlton* v. *United States,* 198 F. 2d 795 (C.A. 9). But whether they are or are not similar offenses, a predisposition to flout the law is a relevant factor on the issue of entrapment.

2. There is no merit to the petitioner's contention that the court below erred in treating the factual issues, on which the defense of entrapment is founded, in the same manner as the other factual issues in the case. Whether the facts, as determined by the trier of fact, constitute entrapment is a legal issue, but both *Sherman* v. *United States,* 356 U.S. 369, and *Masciale* v. *United States,* 356 U.S. 386, make it clear that where the evidence is in dispute the findings of fact are to be made as on other issues and are to be treated similarly in review on appeal.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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